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Nos. 83-1013 and 83-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States moves for leave to file the attached brief *amicus curiae* pursuant to Supreme Court Rule 36.3. Petitioners, Chemical Manufacturers Association ("CMA") and the Environmental Protection Agency ("EPA" or "Agency") have consented to the filing of this brief. Their consent letters have been filed with the Clerk of this Court. Efforts to obtain the

consent of counsel for the Respondents, Natural Resources Defense Council, Inc. ("NRDC"), were unsuccessful, thus necessitating this motion.

The Chamber of Commerce of the United States ("Chamber") is the largest association of business and professional organizations in the United States. Chamber membership exceeds 200,000 business firms and individuals, and includes over 195,000 corporations, partnerships and proprietorships and over 3,900 trade associations, and state and local chambers of commerce. The Chamber regularly represents the interests of its members in litigation of issues of national concern to the American business community and, in fact, filed an *amicus* brief in support of the Petition for Certiorari in this proceeding.[1]

The issue before the Court in this case is whether 301 (*l*) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311 (*l*), prohibits the Environmental Protection Agency ("EPA") from granting "fundamentally different factors" variances ("FDF variances") for toxic pollutants from national pretreatment standards. This issue involves a critical question of statutory construction which goes to the very heart of how EPA administers the Clean Water Act.

The Chamber believes the Third Circuit's decision to strike down the use of FDF variances for toxic pollutants is unduly broad and eliminates the flexibility this Court found so crucial to setting industry-wide regulations under the Clean Water Act in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) and *EPA* v. *National Crushed Stone Association*, 449 U.S. 53 (1980). Moreover, NRDC has indicated that it intends to challenge FDF variances from effluent guidelines on the same grounds as argued below in a lawsuit pending before the U.S. Court of Appeals for the District of Columbia Circuit. *NRDC* v. *EPA*, No. 80-1607. Thus, unless reversed by this Court, the Third Circuit decision will be used to undermine the way EPA develops *all* industry-wide regulations under the Clean Water Act, not just the pretreatment standards challenged below.

EPA develops effluent guidelines and pretreatment standards on an industry-wide basis by combining categorical standards with the opportunity for individual discharges within each category to demonstrate factors "fundamentally different" from those EPA considered when developing the industry-wide regulations. This practice benefits the Agency, the public and the regulated community. By focusing regulation development on typical facilities within a single industrial category and deferring consideration of atypical ones to subsequent individual proceedings, EPA saves time, reduces costs and ensures that similar facilities will be subject to similar treatment. Fair and equitable treatment in setting industry-wide regulations is important to all industrial dischargers, especially to those individual dischargers that EPA overlooked during the national rulemaking process.

The continued availability of FDF variances from effluent guidelines and pretreatment standards is of particular importance to the Chamber's member companies which represent a cross-section of the 60,000 individual firms subject to both sets of industry-wide regulations. These firms include coal companies, iron and steel manufacturers and petroleum refineries. Given the broad impact of the Third Circuit decision on American companies and the significance of this issue to the industrial com-

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[1] *See, e.g., CMA* v. *NRDC*, *cert. granted*, 52 U.S.L.W. 3791 (U.S. May 1, 1984) (No. 83-1013); *TWA* v. *Thurston*, *cert. granted*, 52 U.S.L.W. 3625 (U.S. Feb. 27, 1984) (No. 83-997); *Bowen* v. *U.S. Postal Service*, —— U.S. ——, 74 L. Ed. 2d 402 (1983).

munity as a whole, the Chamber respectfully seeks leave to file the attached brief.

Respectfully submitted,

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion For Leave to File Brief Amicus Curiae for a statement of its interest in this proceeding.

INTRODUCTION

This case arises out of challenges to the Environmental Protection Agency's ("EPA" or "Agency") regulations governing the establishment of "fundamentally different factors" ("FDF") variances from national pretreatment standards under the Clean Water Act. 33 U.S.C. § 1251 (1978).[1] EPA promulgates pretreatment standards on an industry-wide basis under § 307(b) of the Clean Water Act, 33 U.S.C. 1317(b), to control the level of wastewater industrial facilities ("indirect dischargers") may discharge into a publicly-owned treatment plant.

EPA develops pretreatment standards according to specified statutory factors required by § 304(b) of the Act. 33 U.S.C. § 1314(b). These factors include the age of the equipment and facilities involved, the process employed, the engineering aspects of pollution control techniques, energy impacts and the costs of required effluent reductions but not the ability to pay that cost. Under the EPA regulations at issue in this case, any indirect discharger could demonstrate factors "fundamentally different" from these factors, and receive an FDF variance from the industry-wide standards. 40 CFR § 403.13 (1984).

In the proceeding below, the Natural Resources Defense Council, Inc. ("NRDC") challenged the pretreatment FDF variance regulation on two grounds: (1) that EPA has no authority to issue FDF variances; and (2) that § 301(*l*) of the Clean Water Act expressly prohibits FDF variances for toxic pollutants. Section 301

[1] The Chamber of Commerce of the United States does not wish to burden this Court with a detailed restatement of the facts or the proceedings below. Each has been well-stated by the Petitioners, Chemical Manufacturers Association. Accordingly, the Chamber respectfully refers this Court to their Statement of the Case.

(*l*) provides that the "Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under Section 307(a)(1) of this Act." 33 U.S.C. § 1311(*l*).

The U.S. Court of Appeals for the Third Circuit did not rule on the question of EPA's inherent authority to issue FDF variances. Instead, it found the § 301(*l*) argument dispositive, and held that "FDF variances from toxic pollutants were forbidden by § 301(*l*) of the Act." (A-43). The Third Circuit remanded the pretreatment regulations to EPA which revised them "to make clear that the pretreatment FDF variance provision is not available for toxic pollutants." 49 *Fed. Reg.* 5131, 5132 (1984).

Prior to the decision below, FDF variances were available from both pretreatment standards and from their statutory counterparts, effluent guidelines,[2] without regard to levels of pollution control technology. EPA routinely included a FDF variance clause in each of the first-round, categorical "best practical control technology currently available" ("BPT") regulations which direct dischargers had to achieve by July 1, 1977. This FDF variance provision became part of the generic permit regulations on June 7, 1979. 40 C.F.R. § 125.30 (1983). It applied equally to the BPT and to the "best available technology economically achievable" ("BAT") regulations which direct dischargers must meet by July 1, 1984.

EPA added a similar FDF variance provision to the General Pretreatment Regulations on June 26, 1978.[3] 43 *Fed. Reg.* 27736-73. The pretreatment FDF variance,

[2] EPA promulgates effluent guidelines under § 301(b) of the Clean Water Act, 33 U.S.C. § 1311(b), to control the level of wastewater an industrial facility ("direct discharger") may discharge directly into the waters of the United States.

[3] Following further rulemaking, EPA revised these regulations on January 28, 1981. 46 *Fed. Reg.* 9404-60.

like its direct discharger counterpart, did not distinguish between levels of control technology until revised by EPA on February 10, 1984, in response to the decision of the Third Circuit below. Section 403.13 now provides that FDF variances are "not available for any toxic pollutant controlled in a categorical Pretreatment Standard." 49 *Fed. Reg.* 5132 (1984).

SUMMARY OF ARGUMENT

The Third Circuit held in the case below that § 301(*l*) of the Clean Water Act expressly prohibits FDF variances from industry-wide toxic pollutant standards. Accordingly, the court found it unnecessary to reach the issue of EPA's inherent authority to issue FDF variances in the first place.

That holding ignores two prior decisions of this Court, dismisses relevant legislative history and undermines a long-standing EPA practice for regulating atypical industrial dischargers which has been relied upon for years by EPA, the regulated community and the lower courts.

EPA's authority to issue FDF variances was established by this Court in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). In *duPont*, this Court held that EPA may establish BPT effluent limitations by industry-wide regulations "so long as some allowance is made for variances in individual plants." *Id.* at 128. This Court also stated that "nothing . . . . . in the Act . . . . . suggests any radical difference in the mechanism used to impose limitations for the 1977 [BPT] and 1983[4] [BAT] deadlines", thereby suggesting that FDF variances are as necessary for BAT as for BPT. *Id.* at 127. Nor did Congress, which was aware of this decision and of EPA's practice of allowing FDF variances, intend to overrule this Court's decision in *duPont* when it enacted § 301(*l*) in 1977. In fact, this Court reaffirmed the importance of FDF variances in setting industry-wide regulations in *EPA* v. *National Crushed Stone Association*, 449 U.S. 53 (1980), by describing FDF variances as a "necessary aspect" of regulating classes and categories of industrial point sources. *Id.* at 72.

Nevertheless, the Third Circuit below dismissed these clear indications of EPA authority to issue FDF variances from toxic pollutant standards, and broadly interpreted the scope of § 301(*l*) of the Act despite clear legislative history to the contrary. By holding that the Clean Water Act forbids FDF variances for toxic pollutants, the Third Circuit ignored explicit congressional intent to limit only EPA's authority to waive toxic pollutant standards under § 301(c) and (g) of the Act based on individual economic capabilities or water quality considerations but not on § 304(b) factors. 33 U.S.C. §§ 1311(c) and (g). Congress did not intend to limit EPA's authority to issue FDF variances because they do not relieve a discharger from complying with a statutory standard, but rather subject it to a more complete standard.

The Third Circuit's sweeping misinterpretation of § 301(*l*) goes to the very heart of how EPA develops industry-wide regulations for *all* industrial dischargers, not just those subject to pretreatment standards. The Third Circuit decision not only invalidates the use of FDF variances from pretreatment standards, but also jeopardizes the use of FDF variances generally. The decision below threatens EPA's entire regulatory scheme and, unless reversed by this Court, will eliminate the flexibility this Court found so crucial to setting industry-wide regulations under the Clean Water Act.

ARGUMENT

I. THE DECISION BELOW UNDERMINES A LONG-STANDING EPA PRACTICE FOR REGULATING ATYPICAL INDUSTRIAL DISCHARGERS UNDER THE CLEAN WATER ACT.

Section 301(*l*) of the Clean Water Act provides that the Administrator may not modify the requirements of § 301 for toxic pollutants. 33 U.S.C. § 1301(*l*). In the decision below, the Third Circuit broadly interpreted § 301(*l*) and held that "FDF variances for toxic pollutant discharges are forbidden by the Act." (A-43).

The Third Circuit's broad interpretation of § 301(*l*) undermines a long-standing EPA practice for regulating all industrial dischargers under the Clean Water Act. NRDC has notified the U.S. Court of Appeals for D.C. Circuit that it intends to challenge the FDF variance provision for direct dischargers on the same grounds raised in the Third Circuit for pretreatment. Unless reversed by this Court, the Third Circuit's sweeping interpretation of § 301(*l*) will be used to eviscerate EPA's reasonable construction of the statutory scheme it is entrusted to administer. *See Chevron U.S.A.* v. *NRDC*, No. 82-1005 (June 25, 1984).

EPA develops all industry-wide regulations, including pretreatment standards, by combining categorical standards with the opportunity for individual dischargers within each category to apply for a FDF variance. The availability of FDF variances to fundamentally different dischargers is an integral part of developing industry-wide regulations and has become an established Agency practice for regulating both direct and indirect dischargers. In fact, this Court has upheld the role of FDF variances in setting effluent guidelines on two separate occasions. *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) and *EPA* v. *National Crushed Stone Association*, 449 U.S. 53 (1980). Lower federal courts have hailed

the FDF variance as "an administrative safety valve" which "permits a more rigorous adherence to an effective regulation." *NRDC* v. *EPA*, 537 F.2d 642, 647 (2d Cir. 1976) (*quoting Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375, 399 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1979)).

FDF variances are available to both direct and indirect dischargers and therefore are of vital concern to virtually all industrial dischargers, not just those subject to the pretreatment regulations challenged below. The FDF variance process allows EPA to focus its rulemaking efforts on more typical plants in an industrial category. Deferring consideration of atypical plants to a subsequent individual FDF variance proceeding ensures that similar facilities will be treated similarly. It also avoids challenges to an entire set of industry regulations on the grounds that they are not fully representative of industry as a whole.

The FDF variance process also helps EPA expedite its enormously complex task of developing effluent guidelines and pretreatment standards for the 60,000 industrial dischargers regulated under the Clean Water Act. "The sheer number of point sources potentially subject to regulation and the rapidly approaching statutory deadlines required EPA to restrict itself in the regulation promulgation process to a representative sampling of plants." *NRDC*, 537 F.2d at 647.

By coupling the promulgation of national standards with the opportunity to apply for a FDF variance, EPA can regulate dischargers by industrial category rather than individually. Moreover, without a FDF variance provision, there is no guarantee that EPA could effectively remedy defects resulting from the application of "ill-suited" regulations to "unsampled individual plants." *Id.*

FDF variances also helps both sets of industry-wide regulations survive legal challenges[4] and have been used as a bargaining device by the Agency to convince industry not to challenge regulations.[5] Without a variance clause to address atypical situations, future industry-wide regulations also may be the subject of protracted litigation. The Chamber therefore urges this Court to reverse the Third Circuit decision to prohibit FDF variances for toxic pollutants so that EPA's long-standing approach for regulating industrial discharges under the Clean Water Act may continue without the constant threat of impending litigation.

II. THE DECISION BELOW IGNORES TWO PRIOR DECISIONS OF THIS COURT WHICH REQUIRE FDF VARIANCES WHEN SETTING INDUSTRY-WIDE REGULATIONS UNDER THE CLEAN WATER ACT.

The Third Circuit decision to strike down the use of FDF variances for toxic pollutants is inconsistent with this Court's prior interpretations of the Clean Water Act. In *duPont*, this Court approved of EPA's regulatory scheme of allowing FDF variances from industry-wide regulations. At issue was whether EPA could set effluent limitations by regulations for industry categories even though the statute authorized BPT limits for individual point sources and BAT limits for classes and categories of point sources. This Court held that "the CWA authorizes the 1977 BPT limitations *as well as the* [1984] *BAT limitations* to be set by regulations, *so long as some allowance is made for variations in individual*

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[4] *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979). *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (1978).

[5] *See* 48 *Fed. Reg.* 46945-6 (1983) (Proposed regulations to implement settlement agreement resolving all legal challenges to effluent guidelines and pretreatment standards for the iron and steel point source category).

plants, as EPA has done by including a variance clause in its 1977 limitations." *duPont* at 128 (emphasis added). Subsequent decisions have interpreted *duPont* as *requiring* FDF variances. *Weyerhaeuser*, 590 F.2d at 1032 ("recently the Supreme Court held that . . . a variance provision is legally required . . ."); *NRDC*, 537 F.2d at 647 (1976) ("without variance flexibility, the program might well founder on the rocks of illegality").

In *National Crushed Stone Ass'n*, this Court reaffirmed the importance of FDF variances to the development of industry-wide regulations under the Clean Water Act. There the Court described FDF variances as a "necessary aspect" of applying effluent limitations by regulations to classes and categories of point sources. *Id.* at 72. The Court also noted that industry-wide regulations would be defective without FDF variances:

> If a point source can show that its situation . . . is not within the range of circumstances considered by the Administrator, then it may receive a variance. . . . In such situations, the variance is an acknowledgment that the uniform BPT limitation was set without references to the full range of current practices, to which the Administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete.

Id. at 77-78.

Although the FDF variances referred to in both *duPont* and *National Crushed Stone Ass'n* were from BPT effluent limitations, *duPont* makes clear that nothing in the CWA "suggests any radical difference in the mechanism used to impose limitations for [BPT] and [BAT]." *Id.* at 127. Moreover, the BPT standards at issue in *duPont* contained a FDF variance clause and regulated toxic pollutants.

Nor is there any radical difference in the approach EPA uses to develop effluent limitations and pretreatment standards. EPA develops pretreatment standards at the same time as effluent guidelines, according to the same factors required by statute for developing effluent guidelines, and at levels of technology equivalent to BPT and BAT. This approach for implementing the pretreatment program was agreed to by NRDC in the consent decree with EPA which Congress later endorsed by incorporating it by reference in the 1977 Amendments to the Clean Water Act.[6] This approach has been followed by EPA and relied upon by the regulated community since 1977. *EDF* v. *Costle*, 636 F.2d 1229, 1235 (D.C. Cir. 1980).

FDF variances from pretreatment standards serve the same function as FDF variances from effluent guidelines, and are as essential to the development of industry-wide pretreatment standards as they are to effluent guidelines. The Chamber respectfully submits that the rationale of *duPont* and *National Crushed Stone Ass'n* should therefore extend to pretreatment standards as well. Anytime EPA sets industry-wide regulations, allowances also must be made for variations in individual plants, as EPA did by including FDF variances from industry-wide pretreatment regulations.

III. THE DECISION BELOW DISMISSES RELEVANT LEGISLATIVE HISTORY AND IGNORES CONGRESSIONAL INTENT TO LIMIT THE APPLICABILITY OF SECTION 301(*l*) OF THE CLEAN WATER ACT.

Section 301(*l*) of the CWA provides that "the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on

[6] *NRDC* v. *Train*, 8 E.R.C. 2120 (D.D.C. 1976), *modified sub nom. NRDC* v. *Costle*, 12 E.R.C. 1833 (D.D.C. 1979), *modified sub nom. NRDC* v. *Gorsuch* (D.D.C. Oct. 26, 1982) (hereinafter referred to as the "NRDC Consent Decree.")

the toxic pollutant list under section 307(a)(1) of this Act."[7] In the decision below, the Third Circuit broadly interpreted § 301(*l*) to prohibit both FDF variances from toxic pollutants and waivers of BAT and pretreatment obligations authorized by §§ 301(c) and (g) of the Act. 33 U.S.C. § 1311(c) and (g).

The Chamber believes that this interpretation of § 301(*l*) is inconsistent with the legislative history of the Clean Water Act which demonstrates congressional intent to limit the scope of § 301(*l*) to statutory modifications under §§ 301(c) and (g) of the Act. Consequently, we urge this Court to adopt the interpretation of § 301(*l*) presented by EPA here and upheld by the Fourth Circuit in *Appalachian Power Company* v. *Train*, 620 F.2d 1040 (1980).

In *Appalachian Power*, the Fourth Circuit squarely addressed the same issue and arguments presented below,[8] but held that § 301(*l*) did not apply to FDF variances for toxic pollutants from BPT limitations. The Fourth Circuit accepted EPA's arguments that § 301(*l*) applies only to §§ 301(c) and (g), and that a FDF variance does not relieve a discharger from complying with § 301, but rather subjects it to a more complete § 301 standard by using data that was not available during the national rulemaking process.[9] *Id.* at 1047.

[7] This list was developed by EPA and NRDC as part of the consent decree cited above.

[8] Both the Third and Fourth Circuits frame the issue in general terms, without regard to levels of technology. The Fourth Circuit described the issue before it as whether § 301(*l*) "prohibits EPA from modifying any of § 301(*l*) . . . . including BPT limitations, for *toxic pollutants*." 620 F.2d at 1047 (emphasis added). Similarly, the Third Circuit states the issue below as whether "variances for toxic pollutants are forbidden by Section 301(*l*) of the Act." (A-40).

[9] That, in fact, is exactly how this Court described FDF variances in *National Crushed Stone*. See text accompanying p. 9 above.

The Fourth Circuit based its holding on the structure of the Clean Water Act, its legislative history, and the general principle of deferring to an agency's construction of the statute it administers. *Id.* at 1048. Observing that "the best that can be said for § 301(*l*) is that it is not clear," the Fourth Circuit "(gave) weight to the construction of the administering agency" and held that § 301(*l*) does not prohibit FDF variances for toxic pollutant standards. *Id.* at 1048. *Accord, Chevron U.S.A.* v. *NRDC*, No. 82-1005 (June 25, 1984). The Chamber urges this Court to adopt the Fourth Circuit's rationale here.

In the decision below, the Third Circuit not only "disagrees" with the Fourth Circuit's interpretation of § 301 (*l*), but it also dismisses explicit legislative history which demonstrates Congress' primary concern for prohibiting modifications under § 301(c) and (g). (A-42). In so doing, the Third Circuit cavalierly ignores clear congressional intent.

The legislative history of § 301(*l*) should not be dismissed so lightly. Congress was aware of this Court's decision in *duPont* and of EPA's practice of allowing FDF variances when it adopted § 301(*l*). If Congress sought to overrule *duPont* it would have done so explicitly. Instead, Congressman Roberts, House leader of the 1977 CWA amendments, described the objective of § 301(*l*) as follows:

> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modifications of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 328-29 (1978).

The legislative history of the Clean Water Act does not support the Third Circuit's assumption that Congress intended to override or expressly limit FDF variances for toxic pollutant standards when it enacted § 301(*l*) of the Act. On the contrary, the legislative history demonstrates congressional approval of both the FDF variance process and EPA's interpretation that § 301(*l*) of the Act does *not* prohibit FDF variances for toxic pollutant standards.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce respectfully urges this Court to reverse the decision below and to reaffirm EPA's inherent authority to issue FDF variances for toxic pollutant standards as previously established by this Court.

Respectfully submitted,

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